



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL CASE NO. 145 OF 2017**

**DUBAI BANK KENYA LTD (I.L.).....PLAINTIFF/APPLICANT**

**VERSUS**

**DARASA INVESTMENTS LTD.....DEFENDANT/RESPONDENT**

**RULING**

1. This is yet another occasion that the Court is asked to issue what is popularly known as the Maravia Injunction and a following and tracing Order.

2. In Kenya the relief of a Maravia Injunction is codified in Order 39 Rule 5 and 6 which reads:-

“39(5) (1) Where at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him—

(a) is about to dispose of the whole or any part of his property; or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

6.(1) Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the court, the court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.

(2) Where the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached, the court shall order the attachment to be withdrawn, or make such other order as it thinks fit.”

3. The dispute herein, at this Interlocutory stage, is presented by two affidavits of Adam Boru and another one by Ibrahim Noor Hillowly, and as this is an interlocutory session this Court will not be making any hand and fast findings in respect thereof. The evidence at this preamble stage is untested and it is both unnecessary and undesirable for the Court to make a detailed or minute dissection of the same.

4. Dubai Kenya Limited Bank is under liquidation and control of the Kenya Deposit Insurance Corporation. By Legal notice No. 6613 dated 27<sup>th</sup> August 2015, Adam Mohamed Boru was appointed the Liquidator thereof of the Bank with effect from 25<sup>th</sup> August 2015.

5. The case of Dubai Bank (I.L) is that Darasa Investments Ltd (Darasa or the Defendant) was at all material times the holder of Account No. 81183058 with the Dubai Bank (I.L) and on several occasions applied for Credit Facilities from Dubai Bank (I.L). For instance, on 11<sup>th</sup> December 2012 Darasa applied for a sum of Khs.50 million and pledged the following properties as security; L.R NOs. 36/vii/1059; 36/VII/1060; 36/VII/1061; 36/VII/1062; 36/VII/1063; 36/VII/1064; 36/VII/1065; 36/VII/1066; 36/VII/1067; 36/VII/1068; 36/VII/1069; 36/VII/1070; 36/VII/1071; 36/VII/1072; 36/VII/1073; 36/VII/1074 and 36/VII/1075. On 18<sup>th</sup> December 2012 Darasa applied for a Bank facility of Khs.50,000,000/= to be utilized as follows:-

a) Loan of Khs. 15 million

b) Guarantee of Khs.35 million in favour of Trident Insurance Ltd.

On 17<sup>th</sup> September 2014, Darasa sought a loan facility of Khs.250 million and again offered the above captioned properties as security.

6. Dubai Bank (I.L) states that a sum of Khs.40,000,000/= being the amount constituted in the Bank Guarantee was paid in favour of Trident Insurance Company and in addition temporary facilities of Kshs.22,350,000/= granted as requested.

7. There is then an agreement of 20<sup>th</sup> May 2015 between Dubai Bank (I.L) and Darasa whose highlights are that:-

i) Dubai Bank (I.L) had agreed to offer the Company Khs. 170 million towards payment of Professional and Appraisal fees for the construction and development of a Mall.

ii) Darasa was in the process of obtaining a facility from a Bank (other than Dubai Bank (I.L)) to finance the construction of the Mall and will require the titles in respect to the properties above captioned to secure the intended facility.

iii) Dubai Bank (I.L) undertook to release the said titles to enable the proposed arrangement to proceed.

iv) Darasa would deposit with the Bank Certificate of Title to LR. No.36/VII/1061 to be held in lien in the meantime.

v) Upon obtaining the aforesaid finance, Kshs.170,000,000/= will be released to Dubai Bank (I.L) within 14 days of registration of the security Documents but not later than 2 months of the agreement.

vi) Dubai Bank (I.L) would release the Certificate of Title to LR NO.36/VII/1061 upon that payment.

8. Mr. Boru explains that under unclear circumstances the 15 Title Deeds were released to Darasa without receipt of Title to LR 36/VII/1061 and the 16 Titles have since been charged in favour of Synergy Industrial Credit Limit for an aggregate sum of Ks.1,300,000,000/=. In the meantime the sum owed to the Bank remains unpaid and it stood at Khs.103,421,770.85 as at 24<sup>th</sup> January 2015 and continues to attract interest at 29% per annum.

9. Ibrahim Noor Hillowly is the Managing Director of Darasa and sworn an affidavit on 17<sup>th</sup> May 2011. While admitting that Darasa holds Account No. 81183083 with the Bank, he states that the Statement of Account displayed by the Bank contains irregular and fictitious entries.

10. Darasa admits applying for certain facilities through the letters of 11<sup>th</sup> and 18<sup>th</sup> December 2012 but denies that any funds were disbursed by Dubai Bank (I.L) pursuant to that request. In respect to the request for a loan of Ksh. 250,000,000/=:, Darasa maintains a similar Defence that no finances were advanced.

11. In respect to the Guarantee purportedly issued to Trident Insurance, Darasa pleads that it is not privy thereto.

12. Turning to the Agreement of 20<sup>th</sup> May 2005, Darasa asserts that this constituted a distinct transaction involving Khs.170,000,000/= which was to be advanced by Dubai Bank (I.L) whereupon the titles were to be tendered as securities. That Dubai Bank (I.L) declined and/or failed to release the sum of Khs.170,000,000/= and the transaction therefore fell through.

13. At the heart of the Bank's request for a follow-up and tracing of assets of Darasa and the Maravia Injunction is that while Darasa remains in debt to the Bank for a substantial sum, Darasa deceived the Bank into releasing the 15 Titles in exchange for LR 36/VII/1066 which it never surrendered.

14. The purpose of a Freezing Injunction or Maravia Injunction is to restrain *"a party from removing from the jurisdiction assets located there, or restraining a party from dealing with any assets whether located within the jurisdiction or not* (Halsbury's Laws of England vol. 48 2008 5<sup>th</sup> Edition at para 998). In the case of International Air Transport Association & another vs. Akarim Agencies Company Limited & 2 others[2014] eKLR Gikonyo J. accepted the principles set out in Goode on Commercial Law 4<sup>th</sup> Edition at page 1287 as setting out the threshold to be achieved so as to deserve grant of a Freezing order;

***"The grant of a freezing injunction is governed by principles quite distinct from those laid down for ordinary interim injunctions....Before granting a freezing injunction the court will usually require to be satisfied that;***

***(a)The claimant has 'a good arguable case' based on a pre-existing cause of action;***

***(b)The claim is one over which the court has jurisdiction;***

***(c)The defendant appears to have assets within the jurisdiction;***

***(d)There is a real risk that those assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted; and***

***(e) There is a balance of convenience in favour of granting the injunction;***

***(f) The Court can also order disclosure of documents or the administration of requests for further information to assist the claimant in ascertaining the location of the defendant's assets."***

This Court is happy to go along with this threshold.

15. Whilst Darasa doubts that Dubai Bank (I.L) has a good claim against it, it would seem to this Court that there is fairly strong evidence in respect to a debt stemming from the Guarantee to Trident. There is documentary evidence that Darasa applied for this facility in two letters dated 11<sup>th</sup> December 2012 and 18<sup>th</sup> December 2012. There is evidence that on 16<sup>th</sup> September 2014, Trident called up the Guarantee. On 4<sup>th</sup> November 2014, Dubai Bank (I.L) made a payment of Khs.40,000,000/= in favour of Trident through a swift payment to Diamond Trust Bank Kenya Ltd. That payment is debited to Darasa's Account No.81183058.

16. In respect to the temporary accommodation of Khs.22,350,000/= the Bank statement shows certain debits including cash withdrawals and debits. The statement suggests that inclusive of the payment made in respect to the Guarantee, the sum as at 24<sup>th</sup> August 2015 stood at Khs.103,416,770/=. While Darasa states that some entries in the statement are irregular and fictitious, it does not point out to any particular entry.

17. As the threshold to be reached at this stage is a good arguable case, I would find that on the evidence presented and the mere rebuttals put up by the Defence, Dubai has made out a case to that standard that it is owed on account of the Guarantee and perhaps on account of the temporary accommodation it granted. And there is no serious contest that this Court has jurisdiction to hear and determine the claim.

18. Does Darasa have assets within the Courts jurisdiction? The evidence is that Darasa has the following assets within the Courts jurisdiction:-

L.R NOs. 36/vii/1059; 36/VII/1060; 36/VII/1061; 36/VII/1062; 36/VII/1063; 36/VII/1064; 36/VII/1065; 36/VII/1066; 36/VII/1067; 36/VII/1068; 36/VII/1069; 36/VII/1070; 36/VII/1071; 36/VII/1072; 36/VII/1073; 36/VII/1074 and 36/VII/1075.

All these titles are charged to Synergy Industrial Credit Limited for an aggregate sum of Khs.1,300,000,000/=.

19. If this application were to succeed then it must turn on the question whether the Defendant's assets are at a risk of dissipation. Darasa itself accepts that dissipation of assets is the cornerstone of a Freezing Order and also the basis upon which a following and tracing Order can be sought and granted. I am urged to find that Dubai Bank (I.L) has not presented any evidence or otherwise demonstrated to this Court that it (Darasa) is in the process of disposing, wasting and/or damaging any of its assets.

20. It is true that the only relevant evidence put forward by Dubai Bank (I.L) is that Darasa has charged its own properties to a third party. There is no evidence of any other disposal, waste or damage. Infact, as argued by Counsel for Darasa, Darasa is firmly established in Kenya with an ongoing Investment running into millions of shillings. While that may be so there would be instances where disposing off by way of Charge can amount to dissipation.

21. The evidence available is that in exchange for payment of Khs.40,000,000/= paid to Trident, Trident released 15 Titles to Dubai Bank (I.L). Both the tenor of the requests by Darasa and the letter of offer it signed on 2<sup>nd</sup> September 2014, is that legal charges over LR 36/VII/1059 and 30/VII/1060 were to be used to secure the Bank Guarantee, never mind that not all the facilities had been given. These two Titles are among the 15 Titles that were released to the Bank. How Darasa got hold of these Titles is not entirely clear yet substantial amounts may be due and owing to Dubai Bank (I.L).

22. This Court is willing to infer that the conduct of Darasa in charging all these Titles to a 3<sup>rd</sup> Party (Titles which included those which were promised as being available to secure its indebtedness to Dubai Bank (I.L) ) was an act of dissipation of Assets as it put these Assets beyond the reach of the Bank for the time that they are Charged in favour of a Third Party.

23. Of course, as argued by Darasa, the objective of a Maravia Injunction is not to protect a Creditor before Judgment or to grant security to an unsecured claim (CENTRAL BANK OF KENYA VS. GIRO COMMERCIAL BANK LIMITED & ANOTHER [2007] 2 EA and NINEMIA MARITIME CORP VS. TRAVE SCHIFFFAHRTSGESELLSCHAFT MBH & CO. [1984] I ALL EA) 398. But the circumstances here are that the Creditor promised the Bank Security for its debt and surrendered Titles to what was to constitute the security to the Bank. But somehow the titles were released to the Creditor who has now placed them beyond the reach of the Creditor by charging them to a third party. The grant of a Maravia Injunction in these circumstances does not give the Creditor an advantage by creating some form of pre-trial attachment nor does it enhance its position by granting to it security for a Claim as the Order does not improve the position of the Claimant beyond where it would have been had Darasa kept its promise. The real object is to prevent the Judgment of the Court from being rendered ineffective or nugatory through a scheme of dissipation of assets that the Defendant through its Conduct has proved quite capable of perpetrating.

24. Now that the known Assets are, at least for now, beyond the reach of this Court, the Court will allow the Following and Tracing of assets of the Defendant for purposes of them being frozen. The Order of Following and Tracing must, as always, be tempered as it must not burden the Defendant more than is necessary or be so opened ended as to affect 3<sup>rd</sup> parties. The Order this Court will grant will be reflective of such moderation.

25. The Notice of Motion dated 4<sup>th</sup> April 2017 is allowed in only in terms of prayers (2) and (3) thereof.

26.1 Upon such tracing, assets to the value of Kshs.103,421,770/85 shall be frozen to answer to the Plaintiff's claim pending the

hearing and determination of this suit.

26.2 The Plaintiff shall give an undertaking that it will pay damages to the Defendant should it ultimately turn out that the Freezing Order should not have been granted in the first instance.

**Dated, Signed and Delivered in Court at Nairobi this 28<sup>th</sup> day of September, 2018.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Odhiambo for Plaintiff/Applicant

Njoroge for Muchoki for Defendant/Respondent

Nixon - Court Assistant